87-400

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1987

JOSE NUNEZ, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A. CHARLES PERUTO, Esquire
BURTON A. ROSE, Esquire
Washington West Building
N.E.C. 8th & Locust Sts.
Philadelphia, PA 19106
(215) 925-5800

Attorneys for Petitioner

## QUESTIONS PRESENTED

I. Is suppression necessary remedy where Federal agents violate Federal Rule of Criminal Procedure 41(a) by obtaining a search warrant for an automobile from a bail commissioner who is not a "Judge" of a State Court of Record?

2. Does public policy requiring enforcement of Rule 41(a) require suppression where the automobile exception to the warrant requirement under the Fourth Amendment is cited by the Government to excuse deliberate disregard of Rule 41(a)?

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## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment of the United States Constitution, which states as follows:

> "The right of the people to be secure in their persons, houses, papers and defects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath, or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

## GROUNDS FOR JURISDICTION

On May 29, 1987, the United States Court of Appeals for the Third Circuit entered an Opinion denying the Petitioner's direct appeal from a judgment of sentence of the United States District Court for the Eastern District of Pennsylvania in this criminal case. This Court's jurisdiction is therefore invoked under 28 United States Code, Section 1254(1).

## STATEMENT OF THE CASE

On June 3, 1986, your Petitioner, Jose Nunez, was arrested in Philadelphia by agents of the United States Marshall's Fugitive Task Force for having been a fugitive from a federal charge of impersonation of a federal officer in Florida.

Having received information that Petitioner would soon appear at a parking lot at 7400 Roosevelt Boulevard, Philadelphia, Pennsylvania, the Task Force set up a surveillance at the parking lot in question. The Petitioner arrived at 3:20 P.M. on June 3, 1986 driving a Cadillac Eldorado. According to one of the agents, as the Petitioner exited the vehicle, he "reached back into the car like he was putting something into the car or under the seat". The Petitioner then exited the vehicle.

An agent testified that Petitioner then walked around the adjacent vehicle, a black Ford, leading the agent to believe that Petitioner was moving "like he was with this Ford". At this point, the Petitioner was apporached by Inspector Quinn, who stated to Petitioner, "Federal agent, you're under arrest". The deputy Marshall testified at the hearing that the Petitioner was backing away from the officers even after the announcement of the intention to place Petitioner under arrest.

Petitioner was handcuffed and frisked. On his person was found $740.00 United States currency and a set of keys to the Cadillac. No contraband, weapons or narcotics were found in the frisk or search of Petitioner's person.

Immediately prior to this frisk, the Marshall asked the Petitioner if the Cadillac belonged to him, to which the

Petitioner replied in the negative. Petitioner was taken into the back of the car belonging to the United States Marshalls; the inspector radioed for a license check on the Cadillac. Before that information was received, the Petitioner indicated that the Cadillac was in fact his.

At the point, the Marshalls asked the Petitioner for permission to search the Cadillac, which the Petitioner refused, demanding that the authorities first obtain a search warrant.

The Marshall testified that he permitted the Petitioner to retain custody of the United States currency but kept the Cadillack keys because it was the purpose of the officers to obtain a search warrant for the car. On the instruction of the Marshall, the vehicle was blocked into its parking space by another vehicle pending the obtaining of the search warrant.

After the car was secured at the parking lot, the Marshall telephoned an Assistant United States Attorney, Thomas Lee, II, and requested authority to obtain a search warrant; however, Lee refused on the ground that there was not sufficient evidence to justify the issuance of a warrant at that time.

Thereafter, Detective Joseph Hayes of the Philadelphia Police Department, a member of the Fugitive Task Force, contacted the Philadelphia Police Department and obtained the services of a Canine Unit and a dog. The Marshall and Detective Hayes, along with Officer Joseph Long of the Canine Unit and a dog ("Ripper"), traveled to the Detention Center and obtained from an inventory clerk the currency which had been referred to previously as being found on the person of the Petitioner at the time of his arrest.

The money was placed in an envelope and put in an open field, at which time the dog reacted positively to the money.

This party then drove to 7400 Roosevelt Boulevard where the Petitioner's car had been secured. In addition to the aforementioned officers, there were two agents from the Drug Enforcement Administration present at the parking lot. The dog reacted positively at the Petitioner's Cadillac. As a result, the Marshalls removed the Cadillac to the United States Courthouse to be placed in a sallyport where it was placed under lock and seal by the Marshalls pending the obtaining of a search warrant.

During the trip to the United States Courthouse, the agents had occasion to look under the front seat in the area where it had been indicated that the Petitioner had made a furtive gesture; nothing was found of a contraband nature, only a car telephone.

With the concurrence of an Assistant District Attorney, Detective Hayes obtained the search warrant, from a bail commissioner of the Philadelphia Municipal Court.

The warrant was executed by Detective Joseph Hayes at the United States Courthouse along with two agents from the Drug Enforcement Administration; as a result of the search, a kilogram of cocaine was seized from the trunk of the Cadillac on June 4, 1986.

It should be noted that the supervising Marshall testified that he was the person calling the shots during this investigative process, that he was the person who directed that the vehicle be taken into a secure facility at the United States Courthouse and that he was the individual that the other officers contacted in order to find out what procedure they should follow with respect to obtaining a search warrant of the car.

It should also be noted that the Petitioner was removed from the scene of the arrest by the task force and placed in a cell in the United States Marshall's holding area at the United States Courthouse. The Petitioner was not present at the scene when the dog inspected the vehicle nor was he present at the location where the vehicle was searched pursuant to the warrant.

## REASONS FOR GRANTING THE WRIT

### I.

This Court should enforce Rule 41(a) and reject the contention that such noncompliance is excused by the automobile exception under the Fourth Amendment.

As the Statement of the Case indicates, this search of Petitioner's automobile was sufficiently federal in character as to require compliance with Rule 41(a) of the Federal Rules of Criminal Procedure. Not only was the evidence here offered against the Petitioner in a federal prosecution, United States vs. Maggitt, 778 F.2d. 1029 (5th Cir., 1985), these Federal officials acted in concert with State officers in both obtaining the information for the search warrant and in its execution. United States vs. Kovack, 795 F.2d. 1509 (9th Cir., 1986). Therefore, under Byars vs. United States, 273 U.S. 28

(1927) and Lustig vs. United States, 338 U.S. 74 (1949), the joint participation of the federal and State officers under these circumstances mandates compliance with the standards imposed by Rule 41(a).

Under that Rule, a Warrant is valid only where it is issued by a "Judge of a State Court of record". Although a bail commissioner like a state clerk may be empowered by state law to issue search warrants, this individual does not have that power when the warrant is evaluated under federal standards pursuant to Rule 41(a), since it is certainly clear that a bail commissioner is not a "Judge of a State Court of record". United States vs. Passero, 385 F.Supp. 654 (D.C. Mass. 1974); United States vs. Hanson, 469 F.2d. 1375 (5th Cir., 1972).

As indicated in Passero, supra, the failure to comply with this provision of

Rule 41(a) warrants suppression because of the "fundamental" character of this requirement", which is "designed to protect the integrity of the federal Courts and requires suppression of tainted evidence though other requirements of the Fourth Amendment may have been complied with; United States vs. Passero.

In denying relief below, the United States Court of Appeals for the Third Circuit held that given probable cause to search the car, that Court need not address whether or not the Warrant in question complied with Rule 41(a), citing the "automobile exception" to the search warrant requirement of the Fourth Amendment as found in Chambers vs. Maroney, 399 U.S. 42 (1970). In this case, the issue of probable cause has been contested, since the four corners of the Affidavit in support of this Warrant did not indicate how the dog used to detect the presence of controlled substances in

Petitioner's vehicle was reliable or competent to indicate such a result from his sniffing of the vehicle. It is clear that without the dog's reactions being accepted as a basis upon which one might conclude that such drugs existed in the vehicle, there would not be sufficient probable cause. The conclusion of the Court of Appeals below that probable cause existed at an earlier time is not supported by the record and is further contradicted by the conclusion of the Assistant United States Attorney, when consulted by the field officers, that probable cause did not exist to obtain a federal search warrant, prior to the use of a dog to allegedly detect such substances in the vehicle.

If probable cause is determined to be present, however, the Petitioner respectfully submits that the "automobile exception" referred to above should not be the basis upon which noncompliance with Rule 41(a)

under these circumstances should be excused. In this case, the Petitioner specifically asserted his right of privacy to this vehicle by demanding that it not be searched absent a Search Warrant. The Marshalls attempted to obtain a Warrant from the Federal Court, but were refused by an Assistant United States Attorney, who concluded that probable cause did not exist to support such a search. Thereafter, the Marshalls ran an end run around the Federal Courthouse by going to a State Bail Commissioner to obtain the Search Warrant. Certainly, trained federal officers would have been aware of the requirement of Rule 41(a) that only a "Judge of a State Court of Record" could authorize a Search Warrant. The agents' attempt to avoid this requirement should not be condoned by stating that a warrant would not have been necessary in any event because of the "automobile exception" to the Fourth Amendment.

In United States vs. Comstock, 805 F.2d. 1194 (5th Cir., 1984), it was stated that suppression is the appropriate remedy for a Rule 41(a) violation if the federal officers acted in deliberate disregard of the provisions of the Rule. It is respectfully submitted that that is what occurred in the instant case and that the evidence which was tainted by the use of this Warrant must be excluded from the proceedings against the Petitioner under Wong Sun vs. United States, 371 U.S. 471 (1963).

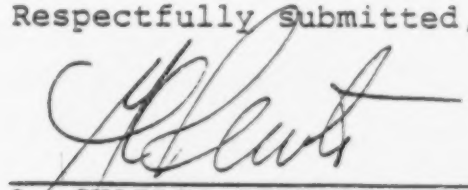
Denying relief to this Petitioner in effect discourages both the use of warrants, especially when one is not only available but is in fact actually obtained by agents, and contravention of the enforcement policies behind Rule 41(a). Petitioner respectfully submits that the integrity of the federal Courts require that this Honorable Court reverse the judgment of the Court of Appeals for the Third Circit and grant appropriate

relief in the interest of justice.

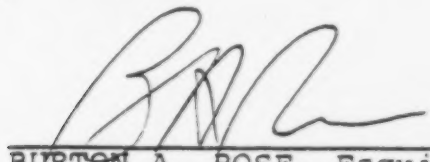
## CONCLUSION

For the reasons above expressed, the Petitioner, JOSE NUNEZ, respectfully submits that this Honorable Court should grant this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, reverse that decision and grant a new trial to the Petitioner JOSE NUNEZ free of the evidence challenged herein.

Respectfully submitted,



A. CHARLES PERUTO, Esquire



BURTON A. ROSE, Esquire
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I, BURTON A. ROSE, Esquire, hereby certify that I did serve a true and correct copy of the within Writ of Certiorari upon Assistant United States Attorney, Ewald Zittlau, Esquire, 3310 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106 and upon the Solicitor General of the United States, Department of Justice, Washington, D.C.

A. CHARLES PERUTO, Esquire

BURTON A. ROSE, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 87-1712

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UNITED STATES OF AMERICA

V.

JOSE NUNEZ,

Appellant

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On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. Cr. 86-00301-01) Honorable James T. Giles.

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Argued May 22, 1987

BEFORE: SLOVITER, BECKER and GARTH, Circuit Judges

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MEMORANDUM OPINION

May 29, 1987

GARTH, Circuit Judge:

On June 3, 1986, appellant Jose Nunez was arrested by the United States Marshall's

Fugitive Task Force at a parking lot in Philadelphia, Pennsylvania. An arrest warrant had been issued on September 7, 1979, because Nunez had failed to appear for sentencing before the Honorable Clyde Atkins of the United States District Court for the Southern District of Florida.

The Task Force, consisting of federal, state and local enforcement officers, had received information from an informant concerning Nunez's whereabouts, and the officers set up surveillance at the parking lot. Nunez drove a 1984 Cadillac Eldorado into the parking lot. Officer Walker testified at the suppression hearing that when Nunez exited the vehicle, Nunez saw the task force officers approaching, and Nunez "reached back into the car like he was putting something into the car or under the seat." Appendix at 15. Walker further testified that after Nunez saw the officers coming towards him, he pretended that he was getting out of an

adjacent Ford autmobile, rather than the Cadillac. Appendix at 16. Detective Marino testified similarly. Appendix at 176-177.

United States Marshal Quinn approached Nunez and told him that he was being placed under arrest. Walker and Marino arrived and nunez was handcuffed. Quinn asked Nunez whether the Cadillac was his car, and Nunez responded that it was not. Nunez was frisked, and the officers discovered $740.00 in United States currency and a set of car keys with a Cadillac emblem. Quinn radioed a request for a license check of the Cadillac, and Nunez then admitted that the Cadillac was indeed owned by him. Nunez denied the officers' request for permission to search the car without a warrant.

Quinn returned Nunez's $740.00, but retained the keys to the Cadillac because the officers intended to obtain a search warrant for the car. Quinn communicated with his supervisor, Deputy United States Marshal

Dennis Matulewicz, requesting authority to obtain a search warrant. Matulewicz in turn spoke with Assistant District Attorney Thomas Lee, who advised Matulewicz that there was insufficient evidence to justify a search warrant for the car.

Matulewicz discussed the case with two Philadelphia police officers, Detective Joseph Hayes and Sergeant Alan Kurtz, and Matulewicz decided to turn the case over to the Philadelphia authorities. They decided to get one of the City's trained narcotics dogs, and Philadelphia Police Officer Joseph Long and his dog "Ripper" were enlisted for this purpose.

At the Philadelphia Detention Center, Nunez's money was taken from him and hidden in a field. Ripper found the money and reacted positively (indicating exposure to controlled substances) to the money. Ripper was subsequently taken to the parking lot which contained approximately twenty parked

automobiles, and in the area of the left rear of Nunez's Cadillac, Ripper again reacted in a manner that indicated the presence of controlled substances.

The Cadillac was driven to the United States Courthouse. Evidence tags were placed on the car, sealing the doors, windows, engine compartment and trunk. Detective Hayes prepared an affidavit stating the probable cause basis for a search warrant. The search warrant was approved by State Bail Commissioner Margaret McCook on the morning of June 4, 1986. The warrant was executed that afternoon and approximately one kilogram of cocaine was seized by Detective Hayes from the trunk of the Cadillac.

On June 12, 1986, a federal complaint and warrant was filed against Nunez, charging him with possession with intent to distribute approximately one kilogram of cocaine in violation of 21 U.S.C. Section 841(a)(1).

On July 7, 1986, a one count indictment was returned by the federal grand jury.

Nunez filed a pretrial motion to suppress evidence on July 28, 1986. A suppression hearing was held before the Honorable James T. Giles on September 4th and 5th. At the conclusion of the hearing, Judge Giles held that there was probable cause to search Nunez's Cadillac, that a warrant was required for the search, and that the issuance of the search warrant was justified. The motion to suppress was denied.

On September 9, 1986, Nunez entered a conditional guilty plea preserving his right to appeal the denial of his motion to suppress evidence. Nunez was sentenced on November 18, 1986, and a timely notice of appeal was filed on November 21, 1986.

I.

On appeal, Nunez argues that the district court's failure to grant his motion to suppress evidence was an error. Nunez raises several inter-related arguments in

support of this conclusion. Nunez contends that the evidence should have been suppressed because the warrant lacked probable cause. Because we conclude that there was a probable cause basis both for the search and for the pre-search seizure of the car, the remainder of Nunez's claims cannot afford him relief.

II.

We agree with the district court that there was a sufficient probable cause basis to seize the automobile. Nunez was out on bail facing charges of assault, resisting arrest, and carrying a loaded .22 caliber revolver. He was also a fugitive from justice under the Florida warrant. The arresting officers initially saw Nunez move about the front of his Cadillac in a manner that indicated to them that he might be trying to hide something in the front of the car. When Nunez left his Cadillac and noticed the officers, he tried to pretend that he had come from a different automobile. Nunez denied owning the Cadillac until the officers began to call in for a license check.

Nunez also had a large amount of cash in his possession. Under these circumstances, the officers had probable cause to seize the Cadillac.

The probable cause basis for the eventual search of the trunk of Nunez's Cadillac included not only all of the above factors, but also the reactions of Ripper, a dog from the Philadelphia Police Department Canine Unit. Ripper had a "definite, positive reaction" to Nunez's Cadillac, appendix at 244, indicating the presence of controlled substances. Under these circumstances, the officers had probable cause to search Nunez's Cadillac.

III.

Because we conclude that sufficient probable cause existed for the search, we need not reach the merits of Nunez's other objections to the search warrant.[1] In Chambers vs. Maroney, 399 U.S. 42 (1970), the Supreme Court held that an automobile may

be searched without a warrant so long as there is a probable cause basis for the search.

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

399 U.S. at 52. See also United States vs. Scheefer, 717 F.2d. 864, 868-69 (3d. Cir. 1983). Indeed, in Chambers, the Court permitted the warrantless search of the automobile even after it had been seized and transported to the police station. 389 U.S. at 52 n.10. It is clear, therefore, that once a probable cause basis for the search of Nunez's automobile has been established, any possible defects in the search warrant itself are of no consequence.

IV.

Becase we conclude that the district court did not err in denying Nunez's motion for suppression of evidence, we will affirm the judgment of sentence entered on November

18, 1986.

TO THE CLERK:

Please file the forgoing opinion.

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[1] Nunez also argued that: (1) the warrant which was issued by a state bail commissioner violated Fed. R. Crim. P. 41(a), which requires that search warrants be issued by, inter alia, judges of a state court of record; (2) the warrant should be judged under federal standards; (3)the affidavit in support of the warrant did not contain sufficient probable cause because it lacked information concerning Ripper's training and capacities; and (4) the "good faith" rule for defective warrants enunciated in United States vs. Leon, 468 U.S. 897 (1984), should not apply.